

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

D.J.C.V., minor child, and G.C., his father,

Plaintiffs,

v.

United States of America,

Defendant.

Index No. 1:20-cv-5747-PAE

**UNOPPOSED MOTION OF *AMICI CURIAE* DEAN ERWIN CHEMERINSKY AND
PROFESSORS SUSAN BANDES, MARTIN FLAHERTY, ERIC FREEDMAN, AND
BURT NEUBORNE FOR LEAVE TO FILE *AMICUS BRIEF* IN SUPPORT OF
PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION TO DISMISS**

Dean Erwin Chemerinsky and Professors Susan Bandes, Martin Flaherty, Eric Freedman, and Burt Neuborne, through the undersigned counsel, respectfully submit this motion for leave to file a brief as *amici curiae* in support of Plaintiff's Opposition to Defendant's Motion to Dismiss. In its Motion to Dismiss, the United States asserts that sovereign immunity precludes any relief under the Alien Tort Statute in this case. *Amici curiae*, a group of renowned constitutional law, foreign relations law, and federal jurisdiction scholars, are particularly qualified to assess the application of federal sovereign immunity in this case, where Plaintiffs allege violations of *jus cogens* norms by the government.

QUALIFICATIONS OF *AMICI CURIAE*

Erwin Chemerinsky is Dean and Jesse H. Choper Distinguished Professor of Law at University of California, Berkeley School of Law. He previously founded and served as Dean and Distinguished Professor of Law, and Raymond Pryke Professor of First Amendment Law, at

University of California, Irvine School of Law, and taught for many years at Duke Law School and at the USC Gould School of Law. In 2014 and 2017, National Jurist magazine named Dean Chemerinsky the most influential person in legal education in the United States. He is the author of eleven books, including leading casebooks and treatises on constitutional law and federal jurisdiction, and more than 200 law review articles, including the article *Against Sovereign Immunity*, 53 Stan. L. Rev. 1201 (2001), which is directly relevant to issues in this case.

Susan A. Bandes is Centennial Professor of Law Emeritus at DePaul University College of Law. Professor Bandes is widely known as a scholar in the areas of federal jurisdiction, criminal procedure, and civil rights. Her articles appear in, among others, the Yale, Stanford, University of Chicago, Michigan, and Southern California law reviews, as well as peer-reviewed journals including Law and Social Inquiry, Constitutional Commentary, and the Journal of Law, Culture and the Humanities. Professor Bandes criticized the doctrine of sovereign immunity in her article *Reinventing Bivens: The Self-Executing Constitution*, 68 S. Cal. L. Rev. 289 (1995).

Martin S. Flaherty is the Leitner Family Professor of Law and Founding Co-Director of the Leitner Center for International Law and Justice at Fordham Law School. His primary areas of focus include constitutional law and history, foreign affairs, and international human rights. Besides teaching, Professor Flaherty has also led or participated in human rights missions throughout the world for the Leitner Center, Human Rights First, and the New York City Bar Association. He is currently Chair of the Council on International Affairs of the New York City Bar Association, where he was formerly Chair of the Committee on International Human Rights, and is a life member of the Council on Foreign Relations.

Eric M. Freedman is the Siggi B. Wilzig Distinguished Professor of Constitutional Rights at Hofstra University School of Law. His primary areas of academic focus include constitutional

law and history, with a special emphasis on the history of the Revolutionary period, the First Amendment, and the separation of powers, including remedies for Presidential misconduct. Professor Freedman formerly chaired the New York City Bar Association’s Committee on Civil Rights, and has served on its Executive Committee. In his recent book, *Making Habeas Work: A Legal History* (N.Y.U. Press 2018), Professor Freedman discussed the “powerful, if oft-misunderstood, maxim, ‘the King can do no wrong,’” a concept examined in the brief.

Burt Neuborne is the Norman Dorsen Professor of Civil Liberties and founding Legal Director of the Brennan Center for Justice at New York University School of Law. He has been one of the nation’s foremost civil liberties lawyers for more than 50 years, serving as National Legal Director of the American Civil Liberties Union from 1981-86, as Special Counsel to the NOW Legal Defense and Education Fund from 1990-96, and as a member of the New York City Human Rights Commission from 1988-92. Professor Neuborne is a nationally recognized constitutional scholar and teacher, has argued numerous Supreme Court cases, and has litigated hundreds of important constitutional cases in the state and federal courts. He is the author of seven books and dozens of law review articles on constitutional law and procedure.

ARGUMENT

“District courts have broad discretion to permit or deny the appearance of amici curiae in a given case.” *United States v. Ahmed*, 788 F. Supp. 196, 198 n.1 (S.D.N.Y. 1992). “Ordinarily, the purpose of an amicus brief is to assist the court in resolving issues of law by explaining or amplifying the issues the parties raise[.]” *United States v. Yaroshenko*, 86 F. Supp. 3d 289, 290 (S.D.N.Y. 2015) (citation and quotation marks omitted).

Here, *amici curiae* would offer “a fresh perspective on an unsettled question of law,” *id.* at 290–91—namely, the viability of a federal sovereign immunity defense against claims of *jus*

cogens violations brought under the Alien Tort Statute. In their brief, *amici curiae* trace the development of federal sovereign immunity from its feudal origins to its current status as an analytically incoherent and constitutionally suspect doctrine. *Amici curiae* then outline why the United States is not entitled to sovereign immunity for claims of *jus cogens* violations, because acts that violate *jus cogens* norms are not sovereign in nature, common-law principles of sovereign immunity incorporated by the Alien Tort Statute do not extend to *jus cogens* violations, and the United States has impliedly waived any sovereign immunity defense for *jus cogens* violations. As prominent constitutional law, foreign relations law, and federal jurisdiction scholars, *amici curiae* are uniquely well-suited to assess the viability of federal sovereign immunity in this case.

CONCLUSION

For the foregoing reasons, *amici curiae*'s motion for leave to file the attached brief should be granted. Counsel for all parties have provided blanket consent to filing any *amicus* brief on the merits.

Dated: December 22, 2020

Respectfully submitted,

/s/ Peter A. Nelson

PATTERSON BELKNAP WEBB & TYLER LLP
Peter A. Nelson
Andrew I. Haddad
Danhui (Diane) Xu
1133 Avenue of the Americas
New York, NY 10036-6710
Telephone: (212) 336-2000
Fax: (212) 336-2222

*Counsel for Amici Curiae Dean Erwin
Chemerinsky and Professors Susan Bandes,
Martin Flaherty, Eric Freedman, and Burt
Neuborne*

Granted. SO ORDERED.



PAUL A. ENGLMAYER
United States District Judge

12/23/2020